Reid J. Cavanaugh, Sole Proprietor *and* Chauffeurs, Teamsters and Helpers Local Union 491 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 6-CA-13088

March 24, 1981

DECISION AND ORDER

On December 5, 1980, Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as herein modified, and hereby orders that the Respondent, Reid J. Cavanaugh, Connellsville, Pennsylvania, his agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In par. 1(b) of his recommended Order, the Administrative Law Judge included a broad cease-and-desist order against the Respondent. We find it unnecessary to impose such a broad order against the Respondent. As the General Counsel has not demonstrated that the Respondent has a proclivity to violate the Act, or that the Respondent has engaged in such widespread or egregious misconduct as to demonstrate a general disregard for employees' fundamental statutory rights, a broad order is not warranted here. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Accordingly, we will modify the Administrative Law Judge's recommended Order by substituting narrow cease-and-desist language for the broad language used by the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

I WILL NOT fail and/or refuse to reemploy economic strikers who have unconditionally requested reinstatement when work for which they are qualified becomes available.

I WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

I WILL offer Robert Showman immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and I WILL make him whole for his loss of earnings, with interest.

REID J. CAVANAUGH

DECISION

STATEMENT OF THE CASE

PHIL W. SAUNDERS, Administrative Judge: Based on a charge filed on January 30, 1980, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 491, herein the Union, a complaint was issued on March 25, 1980, against Reid J. Cavanaugh, referred to herein as Respondent or Cavanaugh, alleging violations of Section 8(a)(1) and (3) of the Act. Respondent filed an answer to the complaint denying it had engaged in the alleged matter. Both the General Counsel and the Respondent filed briefs in this matter.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all times material herein, Respondent, a sole proprietorship with an office and place of business in Connellsville, Pennsylvania, has been engaged in the transportation of goods and materials, and during the 12-month period ending February 29, 1980, Respondent, in the course and conduct of its business operations, provided services valued in excess of $50,000 for other enterprises within the Commonwealth of Pennsylvania, including Allied Mills, Inc.

At all times material herein, Allied Mills, Inc., an Indiana corporation, has been engaged, *inter alia*, in the manufacture, sale, and distribution of livestock and poultry feeds, and during the 12-month period ending February 29, 1980, Allied Mills, Inc., in the course and conduct of its business operations, sold and shipped from its Buffalo, New York, facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of New York.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

It is alleged in the complaint that from on or about April 2, 1979, to on or about May 31, 1979, certain employees of Respondent working at the Connellsville facility, including Robert Showman, ceased work concertedly and engaged in a strike in support of their union organizational efforts; that on or about May 31, 1979, Robert Showman made an unconditional offer to return to his former or substantially equivalent position of employment; that since May 31, 1979, Respondent has failed and refused to reinstate Showman; and that on or about November 15, 1979, Respondent hired Leslie Myers and did so without first offering reinstatement to Robert Showman even though Showman occupied the same or substantially equivalent position of employment as the one for which Myers was hired and has since occupied.

Respondent is basically involved in the trucking and excavating business, and prior to the strike, starting on April 2, 1979, had a variety of different work including the hauling of coal, feed, sand, stone, and other "dump truck" type commodities. Respondent was also engaged in some other general trucking operations involving longer hauls. Consequently, Cavanaugh had two different categories of drivers as indicated on his seniority list—there is one list of drivers entitled "trailers," and another list of drivers entitled "local and dump trucks," and the alleged discriminatee in this proceeding, Robert Showman, was a local or dump truck driver prior to the inception of the strike. Cavanaugh testified that his "long haul drivers" were willing to take loads like the Allied Mills type work and which required 6 a.m. appointments in New York City, Allentown, or Baltimore, and these people (over-the-road drivers) used sleeper cabs in making their hauls. Cavanaugh stated that his local or "dump truck drivers" operated dump trucks or dump trailers, and all of them worked on a local basis—they reported in the morning for their job assignments and then would be back to the terminal at the end of the day.

It appears that Robert Showman was hired by Respondent as a truckdriver on September 9, 1974, and during his several years of employment with Respondent, drove both dump trucks (also referred to as tri-axles) and tractor trailers and in doing so hauled various commodities including sand, gravel, coal, dog food, and a substance referred to as bonemeal or meat scraps. During the early part of 1979, Showman's work consisted mainly of bonemeal runs and, to a lesser extent, over-the-road trips hauling dog food and other products. Showman possessed the necessary certifications which were issued following completion of a written test, road tests, and a physical examination required by the ICC for all over-the-road drivers.

During late 1978 and early 1979, an organizational effort on behalf of the Union took place among Respondent's employees, which culminated in a strike that commenced on April 2, 1979. Showman testified that he has property next to Cavanaugh's garage or terminal, and he had permitted those on the picket line to build a small temporary shanty on his property so that they could escape from bad weather, and that on or about April 4, 1979, Cavanaugh inquired of him if he (Showman) had allowed the pickets to put the shanty on his land, and he informed Cavanaugh that he had. The strike continued until the morning of May 30, 1979, at which time the pickets were pulled in order that a Board election could take place.[1]

The following morning, May 31, 1979, pursuant to instructions from Union Secretary-Treasurer Amos Courtney, the picketers, including Showman, appeared at Respondent's facility and indicated, through employee Richard Doppelheuer, that they were there to return to their jobs, but Cavanaugh then informed the group that there was no work available at this time and asked them to sign a roster to show that they had reported to work.[2] Cavanaugh then informed the group that they would be notified by registered mail when he wanted them to return to work. However, as of the date of the hearing in the instant case, none of the employees who unconditionally offered to return to work and whose names appear on Joint Exhibit 1 have been offered reinstatement with the sole exception of William V. Long, Jr., who was recalled on or about August 13, 1979.[3]

Showman testified that on or about June 2, 1979, some of the people who had offered to return went back to the terminal in order to get their personal belongings and radios and that on this occasion Cavanaugh "cussed" at

[1] Respondent filed objections to the election (Case 6-RC-8441), and it was recommended that the election on May 30, 1979, be set aside, but subsequent thereto the Union withdrew its petition for certification. See Resp. Exhs. 1 and 2, and Jt. Exh. 2.

[2] See Jt. Exh. 1.

[3] It appears that just a few days prior to his recall, Long gave some favorable testimony for Respondent at the hearing on objections to the election. See Resp. Exh. 2

him (Showman), and then told him that for the present he did not have anybody "backing him up," and for Showman to "watch" himself.[4]

Showman testified that in October 1979 he was hired, under a union contract, by the construction firm of Swank and Dickerson, and that he worked there for 6 weeks as a truckdriver before he was laid off in November, but that he is presently on their union seniority list with recall rights, and, in fact, was recently recalled by Dickerson. Showman stated that his wages at Dickerson were $9.66 per hour, and admitted that this was more than his wages at Respondent. He admitted further that he also anticipates staying with Swank and Dickerson.

Leslie Myers was initially hired by Respondent as a truckdriver and a shop worker in 1972, but after a few years went elsewhere as an operator on heavy equipment. Myers then spent 4 years in the service, but testified that within a year or so prior to his discharge he talked on occasions to Cavanaugh about working for him, and again in November 1979 contacted Cavanaugh about employment. Myers testified on this occasion Cavanaugh informed him that he could not hire anybody except for "over-the-road" hauls, and that on November 16, 1979, he was so employed. Myers stated that he took the required tests and obtained the necessary certifications for such driver on or about November 13, 1979, and that Cavanaugh himself administered the driving tests.

Myers testified that during the first few months of his employment, he worked 5 days a week hauling bonemeal, dog food, and food products for Cavanaugh, but since May 1980 he has been on layoff. Further, that during his preliminary discussions with Cavanaugh, it was indicated that at times he would also be working in the shop and, as a result of these discussions and his background, he was hired to do a combination of jobs—to make overnight trips, to do some shop work, and as an operator of heavy equipment.

Myers testified that in doing shop work, he had removed a radiator, helped on brake and tuneup jobs, used test meters, and stated that he had also operated heavy equipment in pulling trucks in and out of the shop, cutting grades, and on occasions loading dirt. Moreover, that he quite frequently made overnight trips to various locations—to New York, to New Jersey, and to Ohio, and that from time to time he would also haul bonemeal, but stated that he could not have been kept busy merely by the local hauling of bonemeal.

Cavanaugh testified that during the 2 months' strike in April and May, Respondent lost about 80 percent of whatever work they had, and that he has recaptured only "a small portion" of their prior work. He stated that on a limited basis he did get back some hauling of dog food for Allied Mills and that this was over-the-road work, but that he did not retain any of the dump truck hauls except an odd job now and then, so he had no occasion to recall dump truck drivers, and stated that approximately 75 to 80 percent of the work Showman did prior to the strike, was local dump hauling. Cavanaugh testified that in respect to hauling dog food to Mallet's Terminal in Pittsburgh—that this work was also lost during the strike, yet he got part of this work back in February and March 1980, but then lost it again within 4 months or so, and that the meat scrap business was similarly lost. In fact, Cavanaugh testified that the limited meat scrap work that was available in September and October 1979, all involving runs of less than 50 miles, was spread out among the existing drivers.

Cavanaugh testified that within the first few months or so after the strike ended, he was only able to call two or three drivers back, and gradually other orders returned, but business was not good, and at the present time Respondent still has only two full-time and four part-time employees who work on an as-call basis. Moreover, according to Cavanaugh, although Respondent previously employed three mechanics, none of them returned after the strike, and as a result he himself performed certain mechanical work, and also the drivers who were called back performed mechanical and excavating work in addition to their driving.

It is the position of Respondent that the job for which Myers was hired was not the same position or job previously held by Showman—that Showman was both unwilling and unqualified to perform the work for which Myers was hired, and that there just simply was not sufficient work of the type performed by Showman to keep a man busy. Cavanaugh maintains that Myers was hired as a "combination man" to perform over-the-road driving using the sleeper cab, to do mechanical and shop work, and also to operate heavy equipment, that it was necessary to have the new employee perform all these types of work in order to obtain a 40-hour week, and that the decision to rehire Myers upon his return from the service, as opposed to recall Showman, was based on "legitimate and substantial business justifications."

As pointed out, in order to properly analyze whether or not the job for which Myers was hired was the same job held by Showman prior to the strike, it is necessary to look at each segment of the work for which Myers was hired, and to compare that with what Showman had done, and then to consider whether Showman had the qualifications to do such work.

Cavanaugh testified that 80 percent of the Allied Mills work which they had returned to them, involved overnight deliveries. Both Cavanaugh and employee John Bialek testified that such overnight trips, and the use of sleeper cabs, were required by the fact that many delivery times were set for early in the morning and, therefore, the driver had to reach the destination the night before, and Cavanaugh's testimony was to the effect that Showman, on numerous occasions, had refused to take overnight trips with the sleeper cab. Both John Bialek and Cavanaugh then related one incident where Showman was assigned to an overnight trip to Baltimore but at the last minute refused to take it, necessitating Cavanaugh having to take it himself.

[4] It is undisputed that a lawful economic strike for union recognition took place from April 2 to May 30, 1979. Moreover, it was stipulated that on May 31, 1979, Showman and the other employees who had been on strike, and whose signatures appear on Jt. Exh. 1, approached Cavanaugh at the Respondent's facility and signed a roster indicating their willingness to return to work, and there is also uncontroverted testimony that the strikers' offer to return to work was unconditional.

Cavanaugh indicated that although other drivers did mechanical or shop work prior to the strike, Showman had never performed mechanical work or had indicated any interest in this type of work. John Bialek testified that, while other drivers worked at the shop, Showman shied away from this kind of work because he did not like it and he did not perform it. On the other hand, Respondent, points out, Myers had performed shop work for Cavanaugh prior to going into the service and had done everything in the shop that needed to be done except for major repairs.

Third, it was required and expected of the employee filling the combination job here in question that he would also be able to operate heavy and excavating equipment for Respondent, and this was not part of Showman's duties prior to the strike, nor at any time did Showman ever indicate that he was qualified as a heavy equipment operator, while on the other hand, argues Respondent, Myers had imminent qualifications in respect to the operation of heavy equipment.

In essence, Respondent argues that Showman's application for reinstatement was for the work which he had performed prior to the strike, and that Respondent was justified in assuming, until further notification, that Showman did not wish to be assigned to work which he did not want when he was working for Cavanaugh prior to the strike. Moreover, Showman was not qualified for some of the work of the combination job, and admittedly could not perform such work.

As pointed out, Cavanaugh indicated that if work became available for which Showman was qualified, he would then recall him, but, argues Respondent, there is a serious legal question as to whether such a recall would be necessary as Showman had found other regular and substantially equivalent employment which, in fact, paid more than he had earned at Cavanaugh, as detailed previously herein. Finally, Respondent contends that there was no evidence presented of a creditable nature to substantiate that Respondent's failure to recall Showman, when it hired Myers, was due to Showman's union activities.

Final Conclusions

Certain principles governing the reinstatement rights of economic strikers are by now well settled. In *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer "refused to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act . . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer." The Court in *Fleetwood* relied on its decision in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *The Laidlaw Corporation*, 171 NLRB 1366, 1369 (1968), stated that:

> The underlying principle in both *Fleetwood* and *Great Dane, supra*, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed. Specifically in *Fleetwood*, the Court found that hiring new employees in the face of outstanding applications for reinstatement from striking employees is presumptively a violation of the Act, irrespective of intent unless the employer sustains his burden by showing legitimate and substantial reasons for his failure to hire the strikers.

First of all, this record shows that the individuals who signed the roster, which is Joint Exhibit 1, including Showman, were the *active* supporters of the Union's strike for recognition, and were the drivers engaged in picketing and other activities designed to bring economic pressure to bear on Respondent, and this record further shows that the only employees or drivers who have been recalled by Respondent, besides Bill Long, are those employees who did not *actively* support the strike, and there is no evidence in this record that any of the employees who have been recalled, other than Long, made unconditional offers to return to work following the strike. Moreover, the job for which Myers was hired was not first offered to Showman, and the examination of Myers' daily hauling reports reveals that the work which Myers performed was substantially equivalent to the work performed by Showman prior to the strike.

The daily hauling reports for Myers show that he was continually hauling bonemeal (beef or scrap meat) and dog food from Allied Mills or Inland Products to Mallet Warehouse or, on occasions, making the same hauls to the same parties, but in reverse order. It readily appears that Myers spent a great majority of his working hours on such hauls, and much less of his total hours engaged in over-the-road hauls.[5] As indicated, this is highly comparable to the work that was done by Showman during the several months' period immediately preceding the strike. For the most part, Showman was hauling bonemeal and feed from Inland, and spent less of his time making over-the-road hauls.[6]

Respondent's evidence is also unpersuasive concerning Showman's alleged disinterest in over-the-road overnight runs, and which Cavanaugh defined on the record as anything beyond 150 miles. Cavanaugh and Bialek testified and contended that a good majority of the work out of Allied Mills in Everson, Pennsylvania, was overnight because of appointment deliveries in the early morning hours. However, Showman also made numerous trips of over 150 miles and with several of them originating in Everson, but testified that he did not consider any of the trips from Everson to Allentown to be overnight trips because they took only 14 hours, and that none of the

[5] See G.C. Exhs. 6(a) through 6(n).
[6] See G.C. Exhs. 5(s) through 5(ee).

drivers who made the Allentown trip used a sleeper cab unless they were going to pick up a backload of Kuhn Transportation in Gettysburg on the way back. Furthermore, all of Myers' over-the-road trips were 15 hours or less, with the exceptions of a 17-hour trip to Alexander, New York, and a 16-hour trip to Allentown, Pennsylvania, and the only two Allentown/Kuhn "backloads" that Myers hauled, took a total of only 13 hours and 15 hours respectively, therefore, as pointed out, it is difficult to ascertain in what manner Myers was required to do any more "overnight" hauls than Showman had previously done.[7] Moreover, Showman testified that he had never complained to Cavanaugh about having to be away overnight, and had not informed Cavanaugh that he did not want either overnight or over-the-road assignments. In fact, Respondent witnesses could cite only one instance where Showman ever refused to take an over-the-road (overnight) trip, and this was to Cockeysville, Maryland, in the winter of 1979. However, Showman testified that he turned down this run because it was not considered a good run in the summer and much less so during bad winter weather. Since Showman had initially agreed to take this load, it would appear that it was the bad weather factor rather than the overnight considerations that caused him to refuse this assignment at the last minute. John Bialek ventured in his testimony that the type of overnight trips that Showman "was inclined to take," based upon discussion among the drivers, were long distance runs "where it would involve several days." However, according to Myers' hauling reports, as previously indicated, he was never dispatched to make a trip of more than 17 hours, much less several days.

Showman testified, and it was not denied, that despite his apparent allergy to bonemeal, Cavanaugh still wanted him on the job of hauling bonemeal because Showman "was doing such a good job." In fact, the bonemeal work was available from November 1979, but was performed by a new hire (Myers) rather than by striker Showman who had previously done this work.[8]

In January, February, and March, 1979, the 3 months immediately preceding the strike, it appears that Showman was spending most of his hours hauling meat scraps or bonemeal but, in certain weeks during this period, was actually working considerably less than 40 hours—in several weeks between 16 and 33 hours. Cavanaugh argues that Showman was not rehired because the normal work he did before the strike would not be sufficient to keep him fully occupied. It is quite obvious, however, that Showman was not always engaged in a 40-hour week in the months immediately prior to the strike and, in fact, seldom worked a full 40-hour week.

As pointed out, no question can be raised by Respondent as to Showman's qualifications to do the driving here in question. Showman possessed the various certifications which the ICC requires of drivers, but the fact remains that at the time Myers applied for the job he did not possess the needed certifications, as aforestated, but was qualified to do the majority of the work for which there was an opening.[9]

Counsel for the Respondent argues that in the instant case there is a complete absence of any evidence of animus or unlawful motive. However, Showman credibly testified that in early April 1979, soon after the strike started, Cavanaugh asked him if he had allowed the strikers to put their shanty on Showman's property, and after Showman told Cavanaugh that he had given them his permission, Cavanaugh then had a disapproving expression on his face and walked away from Showman without saying anything. Showman also testified about an incident involving the returning strikers and Cavanaugh on June 2, 1979, as aforestated, and wherein Cavanaugh told Showman he now had no backing and to "watch" himself. Showman's testimony as to the latter event is also substantially corroborated by witness Richard Doppelheuer, who testified that on this occasion when Showman started to talk to Cavanaugh, "Cavanaugh turned around with his clenched fist and said 'Showman don't get smart with me, I'll smack you right in the mouth,'" and went on to tell Showman that "he didn't have nobody backing him" and that "his ass was his."[10] These remarks were directed at Showman as an individual and, although Cavanaugh was present in the courtroom and available to deny them, he did not testify concerning either of these incidents. Moreover, even absent this evidence of hostility directed specifically at Showman, this record also reveals other instances from which it can be concluded that Respondent was acting pursuant to an unlawful motive or plan to defeat the economic strikers' right to reinstatement. The following employees were "*actively*" involved in the strike in the sense that they not only ceased working, but also picketed or attended union meetings: Doppelheuer, Long, Jr., Whip-

[7] The recent trips to Bronx, New York, and Clifton, New Jersey, referred to in Myers' testimony do not appear in his hauling reports.

[8] Respondent contends that 50 percent of Showman's work was "dump truck type work, hauling stone, gravel, sand," and that this work "disappeared during the strike." However, a look at the daily hauling records reveals that this type of work was substantially reduced as of September 1978, well in advance of the strike, and the same is true of coal hauling which fell off in August 1978, and also scrap metal hauls which fell off in October 1978.

[9] Board decisions make it clear that an employer's obligation to offer available positions to strikers also extends to positions which are not the same as the former position. Thus, in *Bromine Division, Drug Research, Inc.*, 233 NLRB 253 at 261 (1977), it was found that a striker whose former job was in shipping and receiving, should have been offered a production work job for which he was qualified. In *Crossroads Chevrolet, Inc.*, 233 NLRB 728, 730 (1977), it was concluded that the striker, rather than a new hire, should have been offered an available part-time position, even though the striker's former position was full-time. Thus, as pointed out, strikers are entitled to be offered jobs for which they are qualified even if it is a different job or in some respect a less desirable job. Accordingly, Respondent's arguments that it did not need to offer Showman the job because it was not the same as his former job, or because it was anticipated that Showman would find the bonemeal and overnight work undesirable, must be rejected at the outset. At the very least, Showman was entitled to be put to a true test of deciding whether to accept reinstatement or not.

[10] It should also be noted that the facts found herein are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record.

key, Loya, Showman, Jacobs, Smerkar, Stephens, Smith, and Zebley. The names of each of these employees appear on Joint Exhibit 1 as employees who made unconditional offers to return to work on May 31, 1979, but out of these employees only Bill Long, Jr., has been recalled, and Long was returned to work on August 13, 1979, the Monday following his testimony favorable to Respondent's position in the hearing on objections held August 7, 1979, as noted earlier herein.

While there appears to have been very few drivers working during the strike, if any, nevertheless, the record shows that out of the drivers recalled by Respondent—their participation in the strike was on a very limited basis and was considerably less than wholehearted, and, of course, the fact that Respondent reinstated one union adherent (Long) does not exculpate it from the charge of discrimination as to those not recalled.

The General Counsel argues that the most revealing piece of evidence indicating that Respondent created the issue of over-the-road drivers versus local drivers as a device to avoid recalling strikers is Myers' employment interview with Cavanaugh. Myers testified that when he asked Cavanaugh generally about employment, Cavanaugh's response was that the over-the-road was the "only thing we would hire anyone for" because of "the strike and everything," and then told Myers that "they had a strike and the trouble is not with the over-the-road work, it's with the local drivers and he was allowed to hire for over-the-road." I am in agreement that this statement clearly implies that it was the local drivers who had made trouble by striking and being on the picket line, and, as previously indicated, this record reveals that many of the active participants (i.e., pickets) were the local drivers. This conversation is significant evidence in support of the argument that Cavanaugh was engaged in a discriminatory plan designed to avoid rehiring the strike activists.

Turning now to Respondent's argument that Showman was not qualified to do heavy equipment work or mechanical shop work, and thus there was a legitimate business justification for hiring Myers rather than reinstating Showman. Cavanaugh admitted that employees Prinkey, Bialek, Blaney, Richter, and Wilson, all of whom were recalled, had heavy equipment experience, and Cavanaugh further admitted that he gets calls for heavy equipment work very *infrequently*. Showman testified, on the other hand, that Cavanaugh never asked him about his ability to do this type of work, and it also appears that the various mechanical skills which were possessed by Myers, but in which Showman was deficient (ability to use a cutting torch and welder, ability to do brake work and tuneups), were seldom used by Myers, and probably because they were also possessed by so many other of Respondent's employees.[11] Thus, Myers admitted that he tuned up only one pickup truck, and used a cutting torch only once to cut bearings off an axle for the only brake job he had helped on. Myers testified that he took a radiator out, had it recored, and then put it back on. From the testimony it appears that all he did was to unbolt the radiator from its mountings, took it somewhere else to have the recore operation done, and then remounted it. Myers also did work on the wiring of a tractor but not the trailer. These few minor repairs are about all the shop work he did, and from such limited work it is difficult to believe that Myers did anything that Showman was not qualified to do. As pointed out, Myers' worksheets reveal the following specifically noted items of shop work: 11-14-79, oil change; 11-21-79, cleans truck; 1-15-80, flat tire; 1-16-80, clean truck and paint; 1-28-80, take trailer to Fruehauf. The record reveals that Showman also fixed flats, put in lightbulbs, went for parts, washed trucks, and took trucks to be repaired elsewhere.

In the final analysis, the burden of proof is on Respondent to establish that the striker is not reasonably qualified to perform the duties of the job for which there is an opening and, inasmuch as the great majority of Myers' work consisted of driving assignments similar to those previously done by Showman, it must be concluded that Respondent has failed to meet its burden of proof of demonstrating that Showman was not reasonably qualified to fill the position for a "combination employee." Moreover, Respondent's evidence in support of its assertion that Showman had previously restricted his availability for work is insubstantial and unpersuasive for the reasons previously set forth herein. In addition, Respondent's failure to inquire as to Showman's current desires and inclinations regarding his job at the time the need for an additional driver arose, is a further indication of the pretextual nature of this defense and gives rise to the inference that Respondent's pattern of behavior was motivated by a desire to rid itself of a striker who had actively supported the strike and who had made available adjacent property on which fellow strikers and pickets could construct a shelter in event of bad weather.

Finally, Respondent's contention that Showman had regular and substantial employment elsewhere at the time Myers was hired on or about November 16, 1978, is also rejected. Showman was unemployed from the time of his unconditional offer to return to work, May 31, 1979, until he secured temporary employment with Swank/Dickerson Construction for 6 weeks during the late fall of 1979, and ending November 2, 1979.[12] Thus, Showman was available for work at the time Respondent hired Myers on or about November 16. Moreover, at the time Showman was hired by Swank/Dickerson, both he and Courtney were told that the job was only temporary, and Courtney testified that Showman's seniority with Swank/Dickerson was by jobsite only, that there is no company seniority under the contracts which Swank/

[11] Cavanaugh testified that Bialek is the main mechanic and does the major part of the mechanical work, and yet only 75 percent of Bialek's time is taken up with mechanical work. In addition, Respondent currently has a surfeit of other employees with the ability to do mechanical work: Prinkey (who is a certified mechanic), Mains, Blaney, Long, Henry, Richter (who does body work), and Wilson. Moreover, Cavanaugh himself does some shop work.

[12] Although Showman recalled specifically the date of his last paycheck—November 2, 1979—he had trouble recalling the specific date he started. However, Amos Courtney, the union official who helped Showman secure this temporary employment, testified that it was in August or September 1979. September would seem to be correct since a 6-week job ending November 2, 1979, would necessarily have to begin in September.

Dickerson Construction have with Teamsters Joint Council 40, and that Showman's work in the autumn of 1979 was on Highway 119, and at another jobsite in Pittsburgh. As noted, just the day before the hearing in this case, Showman was again hired by Swank/Dickerson to work at a bridge construction jobsite. However, it appears that Swank/Dickerson was not required to rehire or recall Showman for this job by virtue of his past employment on other jobsites, and Showman's latest employment with Swank/Dickerson is therefore as a new hire.

As further indicated, although Showman's temporary work at Swank/Dickerson was similar in nature to his job with Respondent (truckdriving), this alone is insufficient to make this employment "regular and substantially equivalent" to his previous job with Cavanaugh. Most importantly, the Swank/Dickerson job was clearly not "regular," it was temporary. Furthermore, as also noted, even if Showman had secured seniority with Swank/Dickerson—the very fact that this employment is in the construction industry makes it seasonal, sporadic, and uncertain in nature, but the record and exhibits in the instant case reveal that Showman's driving with Respondent was steady and weekly work. Moreover, the Board has indicated that a striker's desire and intent to resume his struck work is a significant factor in determining whether the employee has obtained regular and substantial other work.

Respondent presented no evidence that Showman ever, in any manner, indicated a desire to withdraw his application for reinstatement. Showman testified that he never informed Cavanaugh of his temporary job with Swank/Dickerson. Thus, Respondent failed to present any evidence upon which it could be concluded that Respondent was even aware of Showman's interim employment at Swank/Dickerson. Respondent, therefore, cannot be heard to say that it did not offer reinstatement to Showman because they thought he had another job.

Moreover, even if Respondent's business justifications for refusing to reinstate Showman are found to be legitimate and substantial, this merely shifts the burden of proof back to General Counsel to show evidence of unlawful motivation, and the incidents of animus directed at Showman—the fact that virtually none of the employees who have been reinstated were sympathetic to the strike, and, most revealingly, Cavanaugh's statement that he was "allowed" to hire only the over-the-road drivers because of the "trouble" with the local drivers, and the other statements and incidents detailed previously herein, provide ample evidence of unlawful motivation.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully refused to reemploy Robert Showman on November 16, 1979, I shall recommend that Respondent offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment of a sum of money equal to that which he would have normally earned from the date of Respondent's discrimination, less net earnings, during said period. All backpay provided herein shall be computed with interest on a quarterly basis, in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[13]

CONCLUSIONS OF LAW

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the conduct described in section III above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The Respondent, Reid J. Cavanaugh, Connellsville, Pennsylvania, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to reinstate economic strikers who have unconditionally requested reinstatement when work for which they are qualified becomes available.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make Robert Showman whole for any loss of earnings he may have suffered by reason of Respondent's failure to reemploy him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at his facility in Connellsville, Pennsylvania, copies of the attached notice marked "Appendix."[15] Copies of said notices, on forms to be provided by the Regional Director for Region 6, after being duly signed

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment of The United States Court of Appeals Enforcing an Order of The National Labor Relations Board."

by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has to comply herewith.